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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH S. IVERY,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

WHETHER A DECISION IN AN ARBITRATION PURSUANT TO A GRIEVANCE PROCEDURE IN A LABOR-MANAGEMENT AGREEMENT WILL BE A BAR TO A PROCEEDING AUTHORIZED BY THE FEDERAL TORT CLAIMS ACT?

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GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The United States Court of Appeals for the Sixth Circuit entered its Opinion on August 17, 1982 affirming the Judgment of the United States District Court for the Eastern District of Michigan, granting Summary Judgment to the United States of America.[1] Petitioner sought Rehearing and Rehearing En Banc which was denied on September 22, 1982.

The statute which confers Jurisdiction on this Court is 28 U.S.C. 1254 (1).

THE STATUTES WHICH ARE INVOLVED IN THIS CASE

28 USC §2674

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to Judgment or to punitive damages."

* * *

28 USC §2680

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights: *Provided,* That with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this Chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery,

[1] This case is reported below at 686 F2d 410.

false imprisonment, false arrest, abuse of process or malicious prosecution. For purposes of this subsection "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or make arrests for violation of Federal law."

CONCISE STATEMENT OF THE CASE

Petitioner was employed by the Postal Service as a collector of mail. He was accused of stealing from the mail and discharged from employment. He was also charged criminally by a grand jury indictment of stealing from the mail.

Petitioner, pursuant to a collective bargaining agreement between the United States Postal Service and the National Association of Letter Carriers, filed a grievance regarding his discharge. This ultimately brought the matter to arbitration. The arbitrator, after hearing, held that the discharge of Petitioner had been for just cause because the arbitrator found that Petitioner had stolen from the mail.

After the arbitration proceeding and decision, Petitioner went to trial on the criminal charge of stealing from the mail and was acquitted by a jury verdict.

Petitioner then brought the instant action in the United States District Court for the Eastern District of Michigan for malicious prosecution under the Tort Claims Act, 28 USC §2671 et seq. The United States of America moved for Summary Judgment, claiming the case was barred; the decision in the grievance procedure arbitration favorable to the Postal Service causing a collateral estoppel. The District Court accepted this position and granted the United States of America a Summary Judgment.

Petitioner timely filed a Claim of Appeal to the United States Court of Appeals for the Sixth Circuit.

The United States Court of Appeals for the Sixth Circuit, by opinion filed August 17, 1982, affirmed the decision of the District Court. Petitioner timely sought rehearing and rehearing en banc. Rehearing and rehearing en banc were denied on September 22, 1982.

ARGUMENT

THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED THIS CASE CONTRARY TO EXPRESS HOLDINGS OF THIS COURT AND COURTS OF APPEAL, INCLUDING THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, THAT A RIGHT TO PROCEED IN FEDERAL COURT UPON A RIGHT CREATED BY CONGRESS IS NOT DEFEATED BY A DECISION IN A CONTRACT FOUNDED ARBITRATION THAT IS ADVERSE TO THE FEDERAL COURT CLAIMANT.

This Court, in *Alexander* v *Gardner-Denver Co.*, 417 US 36 (1974) held that the federal courts were not bound by a labor-management agreement arbitration decision in an employment discrimination claim. There were two bases for this decision. The first basis was that the rights were distinctly separate, the arbitration being contractual and the discrimination claim being statutory. The second basis was the reasoning that arbitration was not an appropriate forum to determine a discrimination claim.

This Court, in *Barrentine* v *Arkansas-Best Freight Systems*, 450 US 728 (1981), used the decision in *Gardner-Denver* as a basis for holding that a labor-management agreement arbitration decision would not bind federal courts when the rights sought to be enforced were created by the Fair Labor Standards Act, in particular relying upon the reasoning that the rights to contest were separate and distinct, arbitration being contractual and the Fair Labor Standard Act being statutory, *Barrentine*, supra, at pp 745-746.

These two cases have conclusively established that if rights to proceed in federal courts are created by statute a federal court cannot be bound by an arbitration determination.

The several courts of appeal have followed the rule that separate statutory rights may be litigated in federal courts, even though a necessary issue was decided by a contract arbitration because the rights to arbitration and to proceed in federal courts are separate and distinct. The following cases are illustrative, but not necessarily exhaustive, of this proposition.

The Tenth Circuit held that rights created by a state statute were not barred of litigation in federal court by a contractual arbitration decision, *Peabody Galion* v *Dollar*, 666 F2d 1309 (1981).

The Ninth Circuit has held that an arbitration decision would not bar a right to pursue an unfair labor practice claim, *Stephenson* v *N.L.R.B.*, 550 F2d 535 (1977).

The Seventh Circuit has held that arbitration decisions do not bar federal court resolution of claims brought under the Occupational Safety and Health Act, *Marshall* v *N.L. Industries*, 618 F2d 1220 (1980), nor do they bar suits to enforce orders of the Interstate Commerce Commission, *Carothers* v *Western Transportation Co.*, 554 F2d 799 (1972).

The Third Circuit has held that an arbitration decision would not bar prosecution of a claim based upon rights created by the Federal Mine Safety and Health Act, *Consolidated Coal Co.* v *Marshall*, 663 F2d 1211 (1981).

The District of Columbia Circuit has held that an arbitration decision would not bar a right of action created by the Employment Retirement Income Security Act, *Airline Pilots Ass'n* v *Northwest Airlines*, 627 F2d 272 (1981), nor would a collective bargaining arbitration decision bar a claim authorized by the Mine Safety Act, *Philips* v *Interior Board of Mine Operations Appeals*, 500 F2d 772 (1974).

Although, here, petitioner is pursuing a statutory right in federal court that has had a collective bargaining arbitration decision on a necessary issue made contrary to his contentions, and the Sixth Circuit Court of Appeals has, four times, recognized that in such situations an arbitration decision is not a federal court bar, *Thornton* v *East Texas Motor Freight*, 497 F2d 416 (1974); *Guy* v *Robins and Meyers*, 525 F2d 124 (1975); *Columbus Education Ass'n* v *Columbus City School District* 623 F2d 1155 (1980) and *Becton* v *Detroit Terminal of Consolidated Freightways* 687 F2d 140 (1982), the Sixth Circuit, none the less, affirmed a summary judgment defeat of petitioner's claim on the basis that the arbitration decision collaterally estopped the claim.

The *Becton* case, supra, was decided by a different panel of the Sixth Circuit Court of Appeals on August 24, 1982, seven days after the decision in this case, but its publication, generally, was not made until after Petitioner's counsel, here, had prepared and presented the Petition for Rehearing. We, thus, have the anomalous situation of having the panel of the Sixth Circuit Court of Appeals, in the case at bar, relying upon a District Court decision as reason for its decision and another panel, one week later, reversing the relied upon District Court decision on the very point upon which reliance was made.

The decision of the Sixth Circuit Court of Appeals in the case at bar is plainly contrary to decisions of this Court, particularly *Gardner-Denver* and *Barrentine*, supra, numerous decisions of other Courts of Appeal and four decisions of the Sixth Circuit.

Additionally, the treatment of this Court's recent decision in *Kremer* v *Chemical Const. Corp.*, _____ U.S. _____; 102 SCt 1883 (1982) given in the concurring opinion in this case is curious. The *Kremer* decision, clearly, is an affirmance of the reasoning in *Gardner-Denver* that contract arbitrations do not bar federal court actions on rights created by statute, 102 SCt at p 1895. The concurring opinion sought comparison of *Kremer* with *Bar-*

rentine and *Gardner-Denver*. The decisions in *Gardner-Denver, Barrentine* and *Kremer* are all consistent and supportive of Petitioner's contentions and contrary to Court of Appeals decision. Their reasoning does not support the distinction made by the concurring opinion that the Federal Tort Claims Act did not create any rights. Patently, Petitioner brings this case because of the proviso added by Public Law 93-253 to subsection (h) of 28 USC §2680. Prior to the effective date of this enactment there was no right to make a claim for a malicious prosecution committed by a federal "investigative or law enforcement officer". After the effective date there was such a right because Congress had created it.

The cases relied upon by the Sixth Circuit Court of Appeals are not appropriate to its decision.

Montana v *United States*, 440 US 147 (1979) and *Federated Department Stores* v *Mortie*, 452 US 394 (1981) did not involve prior arbitration decisions; rather, they dealt with prior court decisions.

United States v *Utah Construction and Mining Co.*, 384 U.S. 394 (1966) held that where the parties agreed that arbitration would be fully determinative and Congress, in the Wunderlich Act, directed that arbitration would be determinative, arbitration would be determinative. Here, there was no agreement that the arbitration decision be determinative of Federal Tort Claims actions, but the decision, here, amends both the collective bargaining agreement and the Tort Claims Act by determining the arbitration to be conclusive in all circumstances.

Bower v *Eastern Airlines*, 214 F2d 623 (1954) was a diversity action seeking to enforce rights acquired by a contract which contained arbitration provisions. There were no separately and distinctly created rights, one by contract and another by statute. All rights were created by contract.

While we have primarily contended that the "distinctly separate nature of these contractual and statutory rights"

basis for the decision in *Gardner-Denver*, supra, should be determinative to allow Petitioner's Federal Tort Claims action, the other basis for decision in *Gardner-Denver*, supra, also has applicability. The arbitrator's task, here, was made within a frame work of policy of both the Postal Service and the National Association of Letter Carriers that Postal Service employees be above suspicion. This policy, in the words of the *Gardner-Denver* opinion was "the law of the shop". No such policy should color decisions in suits of malicious prosecution.

Lastly, we believe we should comment upon the Court of Appeals' reference to the evidence offered in the arbitration proceeding and the labeling of Petitioner's contention as a "cock and bull story" and that the arbitration decision established a probable cause that Petitioner cannot negate, 686 F2d at pp 413-414. Whether, here, Petitioner's testimony is a cock and bull story that cannot negate probable cause is a question determined wholly upon the credibility of Petitioner and the federal "investigative and law enforcement officers."

Petitioner's credibility was sufficient to persuade a jury of twelve to a unanimous verdict of acquittal. He stands ready to submit to polygraph examination and to waive any right to bar polygraph evidence; both offers being made without regard to whether the federal "investigative and law enforcement officers" would take similar positions.

Whether the Petitioner's evidence will be a "cock and bull story" and whether the "investigative and law enforcement officers" had probable cause to prosecute plaintiff is dependent upon who, from this group of persons, is telling the truth. The law, as evidenced by this Court's decisions in *Gardner-Denver, Barrentine* and *Kremer*, supra, directs that a factual resolution be made in federal court and there is nothing inherent in Petitioner's situation that says that a factual determination favorable to him is beyond comprehension.

CONCLUSION

The Court of Appeals of the Sixth Circuit has approved an entry of a summary judgment of dismissal in a case based upon rights granted by Congress in the Federal Tort Claims Act because of a prior decision in an arbitration pursuant to a labor-management agreement. This decision is in direct conflict with three decisions of this Court, *Alexander* v *Gardner-Denver*, supra, *Barrentine* v *Arkansas-Best Freight Systems*, supra and *Kremer* v *Chemical Const. Corp.*, supra, many decisions of other Courts of Appeal and four decisions of the Court of Appeals for the Sixth Circuit, one of which was entered but one week after decision in that Court in this case.

Because this case stands alone and contrary to recent decisions of this Court which have established the appropriate rule of law, there is no need for this Court to give full treatment of this case on a grant of certiorari. Supreme Court Rule 23.1 provides for ordering a summary disposition on the merits. Such treatment is appropriate here, and, we submit it would be fully appropriate to order the decision of the Court of Appeals reversed and to direct the return of the case to the District Court for trial.

WHEREFORE, Petitioner prays that this petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted, or, that upon receipt and review of a brief in opposition to this petition an order of summary disposition on the merits enter reversing the decision of the Court of Appeals and remanding this case to the District Court for trial.

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APPENDIX A

IN ARBITRATION

UNITED STATES POSTAL SERVICE, NC-C-15027-0;

and Arbitrator's File 78-83-289;

NATIONAL ASSOCIATION OF LETTER CARRIERS, JOSEPH S. IVERY, *Grievant*. Date of Hearing: November 21, 1978, Detroit, Michigan.

OPINION

Issue

Has Grievant discharged for just cause?

Facts

Grievant had been hired by the Postal Service on December 18, 1976, as a part-time flexible carrier. He was discharged on May 26, 1978, as a result of an investigation by Postal Inspectors on May 3, 1978.

The Postal Inspection Service had received a number of complaints from customers on Grievant's letter collection route to the effect that mail which had been addressed to them had never been received. As a result of those complaints, the Postal Inspection Service undertook a routine investigation.

As was the custom, such investigation was carried out in the following manner: The Postal Service had determined that a frequently missed item on Grievant's collection route were greeting cards which allegedly contained currency. The Postal Service therefore prepared two letters giving the appearance of greeting cards, and inside the cards inserted a total of $13.00 in currency, made up of one-dollar and two-dollar bills. The serial numbers of the bills were recorded, and identifying dots were placed after the signature on the bills. A third piece of mail, a worthless circular, was also prepared to be mailed as a control item, along with the other two pieces of mail.

The Postal Inspectors then placed the three items of mail in a standard mail box on Grievant's collection route, and parked a block or so away in a position to observe the box continuously. The mail was placed in the box by Postal Inspectors some 10 or 15 minutes prior to Grievant's expected arrival at the box. Between the placement of the mail in the box and Grievant's emptying of the box as part of his collection duties, one other postal patron made a deposit of mail.

According to their testimony, in due time the Postal Inspectors observed Grievant come to the box with his mail truck and empty the contents of the box into his truck. After he left the box, the Postal Inspectors immediately went to the box to make sure that all of the mail had been emptied from it. After this was done, the Postal Inspectors then followed Grievant.

While those particular Postal Inspectors were not able to follow Grievant continuously, Grievant was continually followed by Postal Inspectors in radio contact with each other from the time Grievant left the box under observation until the time he arrived at his post office. At no time was Grievant observed to have thrown anything from his vehicle or from the box, nor was he observed to have made any stops which would have enabled him to open mail or secrete mail.

When Grievant arrived at his post office, he parked his truck at the loading dock, as was his custom, and then went inside to report his arrival. Mailhandlers then emptied the mail from his truck into a postage department hamper called a "Gurney". One Postal Inspector immediately inspected the Gurney, and found the worthless piece of mail which had been planted as a control. The two pieces of mail containing the currency were not found.

Grievant stopped at a restroom, and then left the post office building to go to his car, which was parked behind

the building and near a gasoline service station. According to one Postal Inspector, he approached Grievant with the intention of arresting him, and observed Grievant counting currency. He immediately advised Grievant that he was under arrest, and ordered Grievant from his vehicle. He noticed that Grievant had a bill in his hand with an identifying mark on it. Grievant was taken to a postal vehicle in which two other Postal Inspectors were seated. At that point, they examined about half of the currency which Grievant had in his possession, and identified several more bills.

Grievant was then taken to the Postal Inspector's office in the post office, where an inventory of the bills were completed. According to the Postal Inspectors, at no time were the bills away from the presence of Grievant until after the final inventory of the bills. All of the marked money was in Grievant's possession.

According to Grievant's testimony, he did not open any mail, nor did he take any money from any mail. His explanation for his possession of the marked money was that for a period of approximately 45 minutes to an hour while he was being interrogated, one Postal Inspector took the money in his possession—approximately $121.00—and left the room with it. Grievant stated that the marked money was discovered and counted after the Postal Inspector had returned after this absence of 45 minutes to an hour. Grievant further testified that when he was originally approached by the Postal Inspectors, he was not counting any money, but had just started his car. He intended to drive into the gasoline service station to buy some gasoline, and had a $10.00 bill in his hand. His explanation for having two-dollar bills in his possession was that he had received them in the usual course of his daily affairs.

Grievant was given an immediate suspension on May 3rd on the ground that the Postal Service had reasonable

cause to believe that he was guilty of a crime for which a sentence of imprisonment could be imposed. On May 26th he was discharged for having in his possession the cash contents of the missing letters.

Discussion and Opinion

Simply stated, Grievant's defense to the charge levied against him by the Postal Service was a flat denial of any wrongdoing. His explanation for having in his possession the marked money placed in letters put in his mailbox was that the marked money was later put with the money which he had had in his wallet. To accept such an explanation, it would be necessary to believe that some three or four Postal Inspectors concocted this scheme to incriminate Grievant, and then conspired to carry out the scheme with false testimony.

I see no evidence in the testimony given to believe that the Postal Inspectors would go to such lengths to convict Grievant. No testimony was given which would attribute to the Postal Inspectors any motive for doing such a thing. On the contrary, the Postal Inspectors indicated that they have so many cases to investigate, no one case is particularly more significant to them than others.

Grievant himself admitted that he did not know any of the Postal Inspectors, nor had he had any previous contact with them. In addition, his general record with the Postal Service was not particularly remarkable, and there was nothing in his record nor in his relationship with his superiors which gave any indication that anyone would be so anxious to remove him from the Postal Service that they would go to the lengths necessary to do so, which is what Grievant indicated had happened to him. The testimony of the Postal Inspectors indicated that their procedures and manner of operation and routine handling of Grievant's investigation was exactly the same as they had done on an almost daily basis. His case was handled with no greater concern than is customary in their operations.

Grievant pointed out certain shortcomings and defects in the case presented against him by the Postal Inspectors. For instance, the Postal Inspectors admitted that they never saw Grievant open any letters, nor did they see him stop to dispose of any letters, and yet two of the letters which had been planted could not be found. But had the Postal Inspectors intended to convict Grievant at any costs, they would have so fabricated their story as to make it, in effect, fool-proof. The very fact that they admitted that things occurred for which they had no explanation showed that they were willing to testify exactly to what they knew—neither more nor less. The very fact that they did not hesitate to admit to matters which presented difficulties to them is evidence to me that they had no interest in doing anything more than telling what they knew, without regard to the outcome of the matter.

In short, they had no personal interest in Grievant's case, and were just recounting the facts: good, bad, or indifferent. This is proper police procedure. Those doing the investigating should not be interested in anything but presenting facts to those who must make the judgment. This appeared to me to be exactly the case here.

Grievant's explanation is also unsatisfactory on another point: There was testimony by the Postal Inspectors that when they apprehended Grievant in his car immediately after he completed his route, they checked the currency in his possession for identifying marks. At that time they discovered about half of the marked bills. Therefore, Grievant's explanation that marked bills were placed in the currency in his possession later in the Postal Inspector's office would not satisfactorily explain the presence of the marked money discovered at that time. If even one marked bill was not satisfactorily explained, it would indicate that Grievant improperly had some of the marked currency in his possession.

If any of the marked currency was improperly in Grievant's possession, it could only have occurred as a result of his opening the mail entrusted to his possession. No matter how small the amount, it would still be grounds for discharge, because it could only have been obtained improperly. The sanctity of the mails must be inviolate, and the amount taken improperly is not important. The fact that it was taken at all is what is material.

Under the circumstances, I have no reason to disbelieve testimony given by the Postal Inspectors. Therefore, the grievance is denied.

The costs are assessed equally.

Dated this 20th day of December, 1978.

GERALD COHEN
Arbitrator
722 Chestnut Street
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Appendix B–District Court Opinion
(October 10, 1980)

APPENDIX B

(COURT AND CAUSE)
DISTRICT COURT OPINION
(October 10, 1980)

THE COURT: The issue is whether a motion for Summary Judgment should be granted on the basis of Collateral Estoppel but the Plaintiff is maintaining his action for malicious prosecution against the United States Government.

Now, basically, the facts in this case show that Plaintiff's prosecution by the Government resulted from complaints received by the postal service as to the valuable mail which was missing and which was deposited on the Plaintiff's mail route.

The Government states that he had stolen the mail, and Plaintiff's defense was that he was framed.

On May 4, 1978, a criminal charge was brought against the Plaintiff for stealing money from the United States mail. And on May 26, 1978, the Plaintiff was terminated from his position in the postal service.

On July 19, 1978, an indictment was returned against the Plaintiff, and on November 21, 1978, a hearing and grievance was held—an arbitration hearing was held on November 21, 1978, upon the grievance of Mr. Ivery as to whether he was discharged for just cause.

There was a clear determination by the arbitrator, a full adversarial hearing. After everyone had ample opportunity to be heard and to present witnesses, the arbitrator found that the Plaintiff did steal money from the mails.

It is true that on his trial, on the indictment he was acquitted by a jury on a proof of "beyond a reasonable doubt", and was found not guilty.

But, the fact remains that the arbitration hearing was to prevail the standard of either a "clear and convincing" evidence or a "preponderance of the evidence". According to the affidavit file, there was certainly a preponderance of the evidence.

The arbitrator found that the Plaintiff had stolen the money from the mails and the language specifically is that—I'm reading from page six and seven of the arbitrator's opinion.

"If any of the marked currency was improperly in Grievant's possession, it could only have occurred as a result of his opening the mail entrusted to his possession. No matter how small the amount, it would still be grounds for discharge, because it could only have been obtained improperly. The sanctity of the mails must be inviolate, and the amount taken improperly is not important. The fact that it was taken at all is what is material."

An arbitrator denied the grievance. He held that the Grievant was discharged for just cause.

Now, therefore, the Defendant states there are four elements of a cause of action for malicious prosecution according to *Drobczyk* v. *Great Lakes Steel Corp.*, 367 Mich 318, 323, a 1962 case. And these requirements which were universal as far as I know, are first that a criminal proceeding was brought against the Plaintiff and that the termination was favorable to the Plaintiff. And that is true here, because he was acquitted.

The Plaintiff states that there was absence of probable cause for the proceeding and that the Defendant was malicious or had malice or maliciously brought the action for purposes other than bringing an offender to justice.

Those two points, the Plaintiff in the trial of this cause of action would have to prove by a preponderance of the evidence. The first two items are admitted.

Appendix B–District Court Opinion
(October 10, 1980)

The issue is probable cause or sufficient showing of probable cause based upon Collateral Estoppel, arising from the arbitrator to grant the motion for Summary Judgment.

Now, in *Overseas Motors* v. *Import Motors Limited, Inc.*, 375 F. Supp. 499 (1974), Judge Feikens, in defining the requirements for Collateral Estoppel, page 510 and 511.

"There are five basic requirements for Collateral Estoppel: (1) There must be a final and valid judgment affecting the same (of similarly situated) parties as appear in a second action; (2) the issue to be concluded must be the same as that involved in the prior action; (3) the issue must have been raised, considered, and actually adjudicated in the prior action; (4) the issue must have been material and relevant to the disposition of the prior action; and (5) the resolution of that issue must have been essential to the judgment rendered (i.e., not dictum)."

Judge Feikens also went on to point to the fact that it was an arbitration proceeding did not effect its authority as Collateral Estoppel.

Similar in effect is the more recent case by Judge Joiner (sic) in *Becton* v. *Detroit Terminal of Consolidated Freightways*, 490 F. Supp. 464, a 1980 case.

Now, it is clear that the Plaintiff has to show probable cause. It is clear that there has been a firm determination as to show lack of probable cause. It was determined by the arbitrator that there was probable cause.

That determination, I think, clearly becomes a Collateral Estoppel in the cases I've given. It meets the exact standards set by Judge Feikens for Collateral Estoppel. There was a valid judgment affecting the same in situated parties. Here it was the United States Postal Service and Joseph Ivery; it was the United States and the arbitration hearing; it was the United States and Joseph Ivery.

Second, the issue to be concluded in a prior action. There the issue is whether he was guilty of the theft of mail or not. Here is whether there was probable cause. It was determined that he was guilty of theft, so, certainly it was established there was probable cause for prosecution.

Third, the issue must have been raised, considered and actually adjudicated that the person was. Four, the issue must have been material. If it is material to that action and relative and highly material to this action.

And five, the resolution to the judgment was rendered clearly. All of the basis for a Collateral Estoppel are present here and the question of probable cause has been determined. It has been determined that the Government had probable cause.

Therefore, I think Plaintiff is collaterally estopped by that action and I will grant the Motion for Summary Judgment.

Defendant, will you present an order?

(Whereupon the proceedings were concluded at about 3:00 o'clock P.M.)

APPENDIX B

(COURT AND CAUSE)
ORDER GRANTING DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT
(October 15, 1980)

At a session of said Court held in the Federal Building, at Detroit, Michigan on October 15, 1980

PRESENT: Honorable Horace W. Gilmore
United States District Judge

WHEREFORE, the Court having reviewed the pleadings and briefs filed by both parties, having heard the oral arguments presented by the opposing parties, and being fully advised of the facts and relevant law, grants the defendant United States of America's Motion For Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b), each party to bear its own costs, for the reason that plaintiff's cause of action is barred by the doctrine of collateral estoppel and for the reason(s) stated on the record at the aforementioned hearing. This Order is granted with prejudice.

IT IS SO ORDERED:

HORACE W. GILMORE
United States District Judge

No. 80-1789

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH S. IVERY, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	APPEAL From The United States District Court For The Eastern District of Michigan Southern Division.

Decided and Filed August 17, 1982.

Before: MERRITT and JONES, Circuit Judges and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge, delivered the opinion of the court, in which MERRITT, Circuit Judge, joined. JONES, Circuit Judge (pp 9-11) delivered a separate concurring opinion.

WEICK, Senior Circuit Judge. Joseph S. Ivery (Ivery) has appealed to this court from a summary judgment entered against him in his action for malicious prosecution, which he filed against the government in the federal district court for the Eastern District of Michigan under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* In his complaint, filed on June 21, 1979, he alleged that the Postal Inspector employees of the United States Postal Service participated in swearing out a criminal complaint in the federal district court in which it falsely, maliciously and with no probable cause accused him of having committed a crime of stealing money from the United States Mails in violation of 18 U.S.C. § 1709, which resulted in an indictment, trial and his acquittal by a

jury. He further alleged that as a proximate result of the defendant's accusations and complaints, he lost his job as a part-time flexible carrier and has not been able to get another and has suffered much humiliation and distress for all of which he prayed for judgment against the United States for $500,000 actual damages, $500,000 punitive damages, plus costs, interest and attorney's fees.[1]

Ivery neglected to mention in his complaint that prior to his criminal trial he had pursued civil remedies against the Postal Service for his wrongful discharge from his employment as a mail carrier, by filing a grievance under the Collective Bargaining Agreement entered into between the Postal Service and the labor union, the National Association of Letter Carriers, and pursuing the grievance to and including arbitration. In the arbitration hearing, he was represented by counsel and the arbitrator conducted an extensive evidentiary hearing at which Ivery, the Postal Inspectors and other testified at length as to the facts of the entire case.

In a five page single-spaced opinion dated December 12, 1978, the arbitrator stated the only issue:

Was Grievant discharged for just cause?

The arbitrator found the facts and rendered his opinion in which he determined that the grievant had been discharged for just cause.

The arbitrator found the facts as follows:

Facts

> Grievant had been hired by the Postal Service on December 18, 1976, as a part-time flexible carrier. He was discharged on May 25, 1978, as a result of an investigation by Postal Inspectors on May 3, 1978.

[1] Apparently either the plaintiff or his lawyer did not know that the government is not liable for exemplary damages or for prejudgment interest nor for attorney's fees, unless specifically authorized by statute.

The Postal Inspection Service had received a number of complaints from customers on Grievant's letter collection route to the effect that mail which had been addressed to them had never been received. As a result of those complaints, the Postal Inspection Service undertook a routine investigation.

As was the custom, such investigation was carried out in the following manner: The Postal Service had determined that a frequently missed item on Grievant's collection route were greeting cards which allegedly contained currency. The Postal Service therefore prepared two letters giving the appearance of greeting cards, and inside the cards inserted a total of $13.00 in currency, made up of one-dollar and two-dollar bills. The serial numbers of the bills were recorded, and identifying dots were placed after the signature on the bills. A third piece of mail, a worthless circular, was also prepared to be mailed as a control item, along with the other two pieces of mail.

The Postal Inspectors then placed the three items of mail in a standard mail box on Grievant's collection route, and parked a block or so away in a position to observe the box continuously. The mail was placed in the box by Postal Inspectors some 10 or 15 minutes prior to Grievant's expected arrival at the box. Between the placement of the mail in the box and Grievant's emptying of the box as part of his collection duties, one other postal patrol made a deposit of mail.

According to their testimony, in due time the Postal Inspectors observed Grievant come to the box with his mail truck and empty the contents of the box into his truck. After he left the box, the Postal Inspectors immediately went to the box to make sure that all of the mail had been emptied from it. After this was done, the Postal Inspectors then followed Grievant.

While those particular Postal Inspectors were not able to follow Grievant continuously, Grievant was con-

tinually followed by Postal Inspectors in radio contact with each other from the time Grievant left the box under observation until the time he arrived at his post office. At no time was Grievant observed to have thrown anything from his vehicle or from the box, nor was he observed to have made any stops which would have enabled him to open mail or secrete mail.

When Grievant arrived at his post office, he parked his truck at the loading dock, as was his custom, and then went inside to report his arrival. Mailhandlers then emptied the mail from his truck into a postage department hamper called a "Gurney". One Postal Inspector immediately inspected the Gurney, and found the worthless piece of mail which had been planted as a control. The two pieces of mail containing the currency were not found.

Grievant stopped at a restroom, and then left the post office building to go to his car, which was parked behind the building and near a gasoline service station. According to one Postal Inspector, he approached Grievant with the intention of arresting him, and observed Grievant counting currency. He immediately advised Grievant that he was under arrest, and ordered Grievant from his vehicle. He noticed that Grievant had a bill in his hand with an identifying mark on it. Grievant was taken to a postal vehicle in which two other Postal Inspectors were seated. At that point, they examined about half of the currency which Grievant had in his possession, and identified several more bills.

Grievant was then taken to the Postal Inspector's office in the post office, where an inventory of the bills [was] completed. According to the Postal Inspectors, at no time were the bills away from the presence of Grievant until after the final inventory of the bills. All of the marked money was in Grievant's possession.

According to Grievant's testimony, he did not open any mail, nor did he take any money from any mail. His

explanation for his possession of the marked money was that for a period of approximately 45 minutes to an hour while he was being interrogated, one Postal Inspector took the money in his possession – approximately $121.00 – and left the room with it. Grievant stated that the marked money was discovered and counted after the Postal Inspector had returned after this absence of 45 minutes to an hour. Grievant further testified that when he was originally approached by the Postal Inspectors, he was not counting any money, but had just started his car. He intended to drive into the gasoline service station to buy some gasoline, and had a $10.00 bill in his hand. His explanation for having two-dollar bills in his possession was that he had received them in the usual course of his daily affairs.

Grievant was given an immediate suspension on May 3rd on the ground that the Postal Service had reasonable cause to believe that he was guilty of a crime for which a sentence of imprisonment could be imposed. On May 26th he was discharged for having in his possession the cash contents of the missing letters.

There was no contrary proof offered by Ivery at the hearing that money from mail in his route was being pilfered and it was the duty of the Postal Inspectors to investigate it and to bring criminal charges against the perpetrator. The Postal Inspectors had no previous contact of any kind with Ivery and did not even know him and were found by the arbitrator to have had no motive for framing Ivery in the criminal charges. The arbitrator simply did not believe the cock and bull story of Ivery that he was framed. It was the function of the arbitrator in reaching his decision to make credibility assessments. He credited the testimony of the three or four Postal Inspectors. He disbelieved the uncorroborated testimony of Ivery that he was framed. He found that Ivery was caught red-handed with the marked money in his possession. This meant that the Postal Inspectors had

more than probable cause to arrest and prosecute Ivery as he was found to have actually pilfered the money from the mails. It also provided just cause for his discharge. The fact that Ivery was subsequently acquitted on the criminal indictment, after the arbitration award, has no bearing on the subject. The arbitrator's award at that time was final and was not subject to review, as no appeal had been prosecuted therefrom. Furthermore, in a criminal trial, the proof must be beyond a reasonable doubt, whereas, in civil proceedings, such as arbitration, the proof need be only by a preponderance of the evidence or by clear and convincing evidence. The fact of his acquittal merely means that the evidence against him was not beyond a reasonable doubt necessary to support his conviction.

Ivery contends that the arbitrator had no authority under the collective bargaining agreement to hear and determine tort claims, but could deal only "with wages, hours and working conditions." It is submitted that whether Ivery was wrongfully discharged dealt with working conditions and the arbitrator had full power and authority to determine whether he was wrongfully discharged. The effect of this adjudication in a civil action is another matter. In his action under the Federal Tort Claims Act, Ivery sought to recover damages for his wrongful discharge. He is not entitled to recover damages for wrongful discharge because in the prior civil matter it was adjudged that he was not wrongfully discharged. Ivery also could not recover damages in his Federal Tort Claims action for malicious prosecution if the Postal Service had probable cause to have him arrested and prosecuted. In the arbitration proceedings, it was determined that the Postal Service not only had probable cause, but that Ivery actually pilfered the money from the mails. Thus the necessary element of lack of probable cause to support his action under the Federal Tort Claims Act was adjudicated against Ivery in the civil arbitration. Ivery could not bring a suit for reinstatement to his job after the arbitrator had

rendered a final unappealed decision. Nor could he sue for damages in any court for wrongful discharge, as it had been adjudicated by arbitration that he had not been wrongfully discharged. If the arbitrator had decided in Ivery's favor and ordered his reinstatement, the Postal Service would have been required to reinstate him. It could not claim as did Ivery that the arbitrator had no jurisdiction.

We need not decide whether federal or state law governs the application of the doctrines of res judicata and collateral estoppel in federal tort claims cases. For discussion of this question, *see Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978). Both federal and Michigan law would appear to give estoppel effect to issues actually litigated in an arbitration proceeding between the same parties unless the procedures followed suggest that the arbitration process was unfair and the decision unreliable or unless other policies, statutory or contractual, provide an exception. *See Becton* v. *Detroit Terminal of Consolidated*, 490 F. Supp. 464 (E.D. Mich. 1980); *Senior Accountants, Analysts, Etc.* v. *City of Detroit*, 399 Mich. 449, 249 N.W. 2d 121, 125 (1976); *United States* v. *Utah Constr. Co.*, 384 U.S. 394, 422 (1965); *Bower* v. *Eastern Airlines*, 214 F. 2d 623 (3d Cir. 1954); RESTATEMENT (SECOND) OF JUDGMENTS § 132 (Tent. Draft No. 7, 1980); *Montana* v. *United States*, 440 U.S. 147 (1979) and *Federated Department Stores* v. *Mortie*, 452 U.S. 394, 398 (1981).

In the present case there is no suggestion that the arbitration procedures were unfair or that any statutory on contractual policies would provide an exception to the general rule favoring the finality of arbitration decisions between the same parties. The decision here was based on a full adversary evidentiary hearing in which plaintiff was represented by counsel. As District Judge Gilmore stated: "There was a clear determination by the arbitrator, a full adversarial hearing. After everyone had ample opportunity to be heard and to present witnesses, the arbitrator found that the plaintiff did

steal money from the mails." If this finding is given estoppel effect, plaintiff cannot maintain his federal tort action for malicious prosecution because in order to do so, he must be free to show that he did not take the money from the mails. He must be able to negate probable cause in order to prevail, and he cannot do so if the court accepts the arbitrator's findings.

Since under the doctrine of collateral estoppel the arbitrator's finding is determinative on the issues of theft from the mails in a later civil case between the same parties, the District Court was correct in holding the action barred. We would also observe that even if we reached the merits it would appear that the prosecution in the criminal case was also entitled to rely on the same decision as a basis for establishing probable cause.

Accordingly, the summary judgment of the District Court is affirmed.

JONES, Circuit Judge, concurring. Notwithstanding the fact that on consideration of Mr. Ivery's defense that he was set up by his employer or its agents, a cross section of the community concluded that reasonable doubt rebutted the government's theory that he was caught red-handed,[1] the earlier arbitrator's decision established the existence of probable cause[2] that Mr. Ivery stole from the mails. As explained by the majority, that determination is both final between the United States and Mr. Ivery, and fatal to the present cause of action by operation of the dictrine of collateral estoppel.

Mr. Ivery challenges the application of collateral estoppel on two fronts. He first argues that the arbitrator had authority to interpret only the labor agreement and not to decide a federal tort suit. However, case law cited with approval by the Supreme Court allows preclusion of relitigation in a civil suit when an arbitral board has determined that a discharge was for cause. *See United States* v. *Utah Con-*

---

[1] I cannot agree with the gratuitous characterization of Mr. Ivery's defense as a "cock and bull story." *Ante* at 5, However, since the jury verdict may not be construed as a finding in conflict with the probable cause determination, the application of collateral estoppel is not barred by general equitable considerations. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 334 (1971); *Shimman* v. *Frank*, 625 F.2d 80, 89 (6th Cir. 1980).

[2] The Supreme Court of Michigan has defined probable cause as follows:

> To constitute probable cause, there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged.
>
> A person may have "probable cause" for making a criminal complaint from information received from others, which he honestly believes to be true, and of such a character, and obtained from such sources, that businessmen generally, of ordinary care, prudence, and discretion, would act upon it under such circumstances, believing it to be reliable.

Gooch v. *Wachowiak*, 352 Mich. 347, 351-52, 89 N.W.2d 496, 498-99 (1958).

struction & Mining Co., 384 U.S. 394, 421 n.18 (1966) citing *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623 (3rd Cir. 1954). Since the arbitrator's task in the present case was to determine the cause of Ivery's termination, *Bower* and similar authorities are dispositive of his first contention.

Mr. Ivery replies that a recent line of Supreme Court precedent distinguishes such authorities as *Bower* v. *Eastern Airlines, Inc., supra,* when liability is founded upon a federal statute. *See Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *cf. Kremner* v. *Chemical Construction Corp.*, — U.S. —; 50 U.S.L.W. 4487 (May 17, 1982) (state court affirmance of agency determination).

Mr. Ivery reads these cases too broadly. Both *Barrentine* and *Alexander* rely upon a statute providing "minimum substantive guarantees to individual workers." *Barrentine,* 450 U.S. at 737. But beyond a substantive guarantee, both Title VII, 42 U.S.C. § 2000e, *et seq.* (1976), at issue in *Alexander,* and the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976), at issue in *Barrentine,* evidence an intention to separate the public law right from "majoritarian processes" of collective bargaining. *Id.* at 738, quoting *Alexander,* 415 U.S. at 51. Overlapping remedies were intended. *Alexander,* 415 U.S. at 47-49.

The Federal Tort Claims Act does not create a minimum guarantee nor can it be said to be a part of our nation's labor dispute resolution mechanism. The Act was designed to eliminate sovereign immunity. *E.g., United States* v. *Muniz,* 374 U.S. 150, 152 (1963); *United States Government* v. *Employees Insurance Co., Inc.*, 612 F.2d 705, 706 (2d Cir. 1980). Is creates no new causes of action, rather it accepts liability in circumstances which would render a nongovernmental defendant liable. *Feres* v. *United States,* 340 U.S. 135, 141 (1950); 28 U.S.C. § 2674 (1976). The Federal Tort Claims Act did not create a separate right from an existing

scheme of enforceable duties;[3] and no overlapping remedy was intended: "[T]he primary purpose of the Act was to extend a remedy to those who had been without; if it incidently benefitted those already well provided for, it appears to have been unintentional." *Id* at 140.

Appellant has cited no authority for the conclusion that the exception to collateral estoppel for statutory guarantees invoked in *Barrentine* and *Alexander* is applicable to this Federal Tort Claims Act context. The authorities just reviewed strongly stand against that conclusion. Accordingly, I concur in the judgment.

---

[3] The purpose of Congress to replace the cumbersome private bill procedure for victims of governmental wrongdoers, *see, e.g., United States* v. *Muniz*, 374 U.S. 150, 154 (1963); *Downs* v. *United States*, 522 F.2d 990, 995 (6th Cir. 1975), is altogether different from the creation of an additional legal remedy. A private bill is an act of legislative grace and in no sense a right of the party to be benefitted thereby. Further, the Federal Tort Claims Act was intended to replace and not to supplement that procedure.

APPENDIX D

No. 80-1789

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH S. IVERY
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA
Defendant-Appellee

ORDER
(Filed: September 22, 1982)

Before MERRITT and JONES, Circuit Judges and WEICK, Senior Circuit Judge.

No active judge of this court having requested that a vote be taken upon the suggestion of appellant that his petition for rehearing be heard en banc, said petition for rehearing was therefore referred to the panel for consideration and determination.

Upon consideration, we are of the opinion that we have adquately considered and discussed all of the pertinent issues involved in this appeal and that the petition for rehearing lacks merit and should be and hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) JOHN P. HEHMAN
Clerk

Office-Supreme Court, U.S.
FILED
FEB 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1029

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH S. IVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a prior arbitral finding that petitioner stole money from the mails barred petitioner's action for malicious prosecution arising out of the same incident.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-22a) is reported at 686 F.2d 410. The opinion of the district court (Pet. App. 7a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1982, and a petition for rehearing was denied on September 22, 1982 (Pet. App. 23a). The petition for a writ of certiorari was filed on December 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was hired by the Postal Service as a part-time letter carrier in 1976. In May 1978, he became the subject of an investigation by the Postal Inspection Service after several customers on his mail route had complained

that mail addressed to them was never delivered. As is routine in such investigations, postal inspectors placed envelopes containing marked money in a collection box on petitioner's route. When the envelopes containing the marked money were not found among the mail petitioner brought back to his post office, he was arrested. The marked money was in petitioner's possession. Pet. App. 13a-15a.

As a result of the postal inspectors' investigation, petitioner was discharged from the Postal Service on May 26, 1978. Petitioner challenged his discharge by filing a grievance under the collective bargaining agreement between his union, the National Association of Letter Carriers, and the Postal Service. On December 20, 1978, following a hearing before an arbitrator at which both petitioner and the Postal Service were represented by counsel and had the opportunity to call witnesses, the arbitrator denied petitioner's grievance, concluding that he had stolen from the mails. Pet. App. 4a-6a, 13a, 18a-19a.

A criminal indictment also was returned against petitioner on July 19, 1978, charging him with theft from the mails by a Postal Service employee, in violation of 18 U.S.C. 1709. Petitioner was acquitted by a jury in the criminal case on January 5, 1979. Pet. App. 7a, 12a-13a.

2. Petitioner then initiated this action against the United States under the Federal Tort Claims Act for malicious prosecution in the bringing of the criminal action. The district court granted summary judgment against petitioner on the ground that the prior arbitral determination that petitioner had stolen from the mails collaterally estopped him from arguing that the government lacked probable cause to initiate the criminal proceeding, an essential element of a cause of action for malicious prosecution. Pet. App. 7a-10a.

The court of appeals affirmed (Pet. App. 12a-22a). The court noted (*id.* at 17a) that the absence of probable cause is a necessary element of an action for malicious prosecution and that that issue had been decided adversely to petitioner by the arbitrator: "In the arbitration proceedings, it was determined that the Postal Service not only had probable cause, but that [petitioner] actually pilfered the money from the mails." The court explained (*ibid.*) that petitioner's subsequent acquittal in the criminal case did not detract from this finding: "[I]n a criminal trial, the proof must be beyond a reasonable doubt, whereas, in civil proceedings, such as arbitration, the proof need be only by a preponderance of the evidence or by clear and convincing evidence. The fact of his acquittal merely means that the evidence against him was not beyond a reasonable doubt necessary to support his conviction." The court therefore concluded (*id.* at 18a) that, in the absence of any "suggestion that the arbitration procedures were unfair or that any statutory or contractual policies would provide an exception to the general rule favoring the finality of arbitration decisions between the same parties," the arbitral determination that petitioner had stolen from the mails collaterally estopped him from arguing that the government lacked probable cause to institute criminal proceedings against him.[1]

ARGUMENT

The court of appeals correctly applied settled law, and its decision conflicts with no decision of this Court or any other court of appeals. Further review therefore is not warranted.

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[1]The court of appeals also held that, even if petitioner were not collaterally estopped from litigating the probable cause question, he would lose on the merits (Pet. App. 19a): "[I]t would appear that the prosecution in the criminal case was * * * entitled to rely on the [arbitral] decision as a basis for establishing probable cause.

1. Petitioner does not challenge (Pet. 6) the general rule that precludes relitigation in a damages action of an issue previously decided by an arbitrator. See *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421 & n.18 (1966), citing *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623 (3d Cir. 1954). He argues (Pet. 3-5), nevertheless, that this Court's decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), establish an exception to the general rule whenever the damages claim is based on a federal statute. Petitioner's contention fails because it is based on an overly broad reading of the decisions on which he relies.

In *Gardner-Denver* and *Barrentine*, the Court held that a prior arbitral decision does not bar a claim arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA). In so holding, the Court carved out an exception to the general rule against relitigation of arbitral findings for claims based on federal statutes creating independent, substantive rights. *Barrentine, supra*, 450 U.S. at 737-739; *Gardner-Denver, supra*, 415 U.S. at 49-54. The court of appeals decisions on which petitioner relies (Pet. 4-5) likewise involve "rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, 450 U.S. at 737. Moreover, the statutes at issue in those cases reveal an intent to "accord parallel or overlapping remedies," *Gardner-Denver, supra*, 415 U.S. at 47, which are "separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining." *Barrentine, supra*, 450 U.S. at 738, citing *Gardner-Denver, supra*, 415 U.S. at 51.[2]

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[2]See, *e.g.*, *Becton* v. *Detroit Terminal of Consolidated Freightways*, 687 F.2d 140, 142 (6th Cir. 1982) (42 U.S.C. 1981); *Peabody Galion* v. *Dollar*, 666 F.2d 1309, 1320-1324 (10th Cir. 1981) (Oklahoma statute

By contrast, the Federal Tort Claims Act provides no substantive rights against the federal government. That statute was intended not to accord a parallel or overlapping federal remedy, but simply to eliminate the defense of sovereign immunity in certain cases in which a non-governmental entity would have been liable under existing state law. 28 U.S.C. 1346(b) and 2674. See *United States* v. *Muniz*, 374 U.S. 150, 153 (1963). Petitioner's cause of action is wholly a creation of state law.[3] Accordingly, the exception to the collateral estoppel rule articulated in *Gardner-Denver* and reaffirmed in *Barrentine* is inapplicable to petitioner's action under the Federal Tort Claims Act for malicious prosecution.

2. Petitioner also suggests (Pet. 7, quoting *Gardner-Denver, supra*, 415 U.S. at 53) that the arbitrator's decision against him was improperly "color[ed]" by " 'the law of the shop' " of both the Postal Service and the National Association of Letter Carriers to the effect that Postal Service employees must be "above suspicion." There is no evidence, however, that any such "law of the shop" entered into the arbitrator's decision. See Pet. App. 1a-6a. Based on the

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authorizing an action for damages against an employer who discharges an employee because he filed a workers' compensation claim); *Consolidation Coal Co.* v. *Marshall*, 663 F.2d 1211, 1218-1219 (3d Cir. 1981) (Federal Mine Safety and Health Act of 1977); *Air Line Pilots Association* v. *Northwest Airlines, Inc.*, 627 F.2d 272, 277-278 (D.C. Cir. 1980) (ERISA); *Marshall* v. *N.L. Industries, Inc.*, 618 F.2d 1220, 1222-1223 (7th Cir. 1980) (Occupational Safety and Health Act); *Stephenson* v. *NLRB*, 550 F.2d 535, 539-541 (9th Cir. 1977) (unfair labor practice provisions of the National Labor Relations Act). Cf. *Carothers* v. *Western Transportation Co.*, 554 F.2d 799, 806 (7th Cir. 1977) (suit under the Interstate Commerce Act for enforcement of an Interstate Commerce Commission order).

[3]As the court of appeals observed (Pet. App. 18a), "[b]oth federal and Michigan law would appear to give estoppel effect to issues actually litigated in an arbitral proceeding * * *."

evidence presented to him, the arbitrator simply "resolve[d] * * * the factual question[]" whether petitioner had stolen from the mails. *Barrentine, supra,* 450 U.S. at 743. Petitioner had a full and fair opportunity to challenge that factual allegation in the arbitral proceeding (Pet. App. 18a-19a).

Moreover, this Court's concern with "the law of the shop" was that its application by an arbitrator might undermine the congressionally mandated substantive protections of Title VII or the FLSA. See *Barrentine, supra,* 450 U.S. at 743; *Gardner-Denver, supra,* 415 U.S. at 57. Because the Federal Tort Claims Act creates no substantive rights, the "law of the shop" consideration does not apply here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-1029

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH S. IVERY,
Petitioner

-VS-

UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 82-1029

JOSEPH S. IVERY, *Petitioner*

v

UNITED STATES OF AMERICA

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Several matters in the Solicitor General's Brief in Opposition call for a reply.

STATEMENT OF THE CASE

The Solicitor General's brief stated as undisputed fact conclusions some matters which cannot be such in this case for, here, there has yet to be a contested factual hearing.

The Solicitor General, in his Statement, (paragraph 1) as did the Court of Appeals for the Sixth Circuit, in its opinion, has taken determinations of the Arbitrator in the labor-management grievance procedure and stated them as facts. The sole issue, here, is whether these determinations are a bar to the prosecution of a claim grounded in rights given by the Congress in the Federal Tort Claims Act. Such statements assume the unquestioned accuracy of the determinations of the Arbitrator. Statements as to how petitioner became the subject of an investigation, what the postal inspectors did during the investigation and what they found or didn't find during the investigative routine and on petitioner's arrest are conclusions of the Arbitrator, and to state them as fact is unwarranted and, within the frame work of this litigation, misleading.

In the second paragraph of what the Solicitor General identifies as 2 of the Statement (Brief in Opposition, p 3) it is stated that an element of petitioner's claim, absence of probable cause, was decided adversely to petitioner in the arbitration proceeding and that acquittal on litigation of the criminal charge did not detract from the finding. This accurately describes what occurred in the Opinion of the Court of Appeals. However, it again shows that the Solicitor General and the Court of Appeals wish this case to be resolved by the conclusions of the Arbitrator when the question presently to be resolved is—must it be so resolved without a contested factual hearing in District Court?

ARGUMENT

The Solicitor General contends that we make an over broad reading of this Court's decision in *Alexander* v *Gardner-Denver Co.*, 415 U.S. 36 (1974). He contends that the decision, there, was limited to situations of federal statutes creating independent substantive rights where Congress intended to provide parallel or over lapping remedies separate from the processes of collective bargaining.

We do not believe that our reading of *Gardner-Denver* is over broad. Rather, it is consistant with what this Court believed to be its holding when *Barrentine* v *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981) was decided. The decisional language of *Barrentine* was:

"As we stated in *Gardner-Denver:*

> 'In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under [the statute], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result

> of the same factual occurrence. And certainly no inconsistancy results from permitting both rights to be enforced in their respectively appropriate forums.' (Citation omitted)
>
> *Reversed.*"

Barrentine v *Arkansas-Best Freight Systems*, supra at pp 745-746.

We submit that when this Court decided *Kremer* v *Chemical Const. Corp*, _____U.S._____; 102 S Ct 1883 (1982) the Court indicated that the separate and distinct nature of the rights was the primary basis for the *Gardner-Denver* decision, as the dissenters in *Gardner-Denver* joined in the majority opinion of Mr. Justice White which said:

> "Our decision in *Gardner-Denver* explicitly recognized the 'distinctly separate nature of these contractual and statutory rights.' " *Kremer* v *Chemical Const. Corp.*, supra at p 1895.

The majority opinion in *Kremer*, supra, also pointed out that arbitration was not an appropriate forum to effectuate the requirements of enacted legislation, but was rather, a forum to effectuate the intent of parties to a contract. We submit that by holding the arbitration decision a bar the Court of Appeals, without contractual or legislative authority, seeks to amend the collective bargaining agreement and the Tort Claims Act.

While both the majority and the dissenters in *Kremer*, supra, were of the opinion that the decision in *Gardner-Denver* was based, in part, upon the inappropriateness of a forum other than a federal court to decide claims created by federal statute, it is quite apparent that the majority believed that arbitration, by its nature contractual, was inherently inappropriate. The dissenters did not disagree. They felt that state administrative agencies and reviewing courts

could also be inappropriate forums for the resolution of claims created by federal statute.

The argument that petitioner did not receive his right to bring this action by enactment of federal statute, but was only provided a remedy by federal statute, is specious. The existance of governmental immunity determined that there were no rights against the government and this was true from the time English nobles wrested the Great Charter from King John until statutory enactments created causes of action against the government. To argue that all that was done by statutes creating causes of action against the state was the giving of a remedy for a right that had existed is arcane and not in keeping with reality.

Even if the mysterious nature of the source of petitioner's right that is proffered by the Solicitor General, here, is accepted, it does not show that petitioner's right was not created by Congress. When the initial Federal Tort Claims Act was enacted in 1946 it provided for a broad grant of rights but made numerous exceptions, many of which related to the intentional torts of government employees. In short, it was the legislative scheme to grant broad rights and then take some away by legislatively spelling out exceptions. Here, an exception regarding the intentional torts of certain government employees was removed in 1974 by enacting a special proviso that granted a right on and after the date of enactment of the proviso. There was no right before the enactment of the proviso. Enacting the proviso created the right.

Lastly, the Solicitor General argues that there is no indication in the Arbitrator's decision that the "law of the shop" played any part in the arbitration decision adverse to the petitioner. We submit that the teachings of *Gardner-Denver, Barrentine* and *Kremer* are that the "law of the shop" is, inherently, a part of a collective bargaining arbitration. Here, when the arbitrator said:

"The sanctity of the mail must be inviolate, . . ." (6a),

it is clearly demonstrated that the "law of the shop", inherent in every collective bargaining arbitration, coloring its determinations, was an expressed part of the arbitration determination in this case.

The Court of Appeals for the Sixth Circuit has, four times, recognized that an adverse arbitration decision will not bar a federal court trial of a claim based upon rights granted by federal statute. The four claimants in these cases were equally protected by the law, as were the numerous claimants that brought similar claims for review in the several other Courts of Appeal. Petitioner stands alone in not having his claim, created by federal statute, afforded a federal court trial. Quite literally, the District Court and the Court of Appeals, here, have denied petitioner the equal protection of the law.

WHEREFORE, Petitioner prays that this petition for certiorari be granted, or, alternatively, that summary disposition on the merits pursuant to Supreme Court Rule 23 be made and the case be remanded to District Court for trial.

Respectfully submitted,
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